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No. 489

In the Supreme Court of the United States

OCTOBER TERM, 1910.

SILVER KING COALITION MINES COMPANY, A CORPORATION,
Petitioner,
vs.
CONKLING MINING COMPANY,
A CORPORATION,
Respondent.

On Application for Writ of Certiorari.

RESPONDENT'S BRIEF.

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WM. D. McHUGH,
WM. W. RAY,
WM. H. KING,
WM. J. BARRETTE,
Solicitors for Respondent.

SUBJECT INDEX.

AUTHORITIES CITED

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FOREWORD. By way of preface we call the Court's attention to our extended brief and argument filed in No. 574 in this court, which case will be found to be an application for a writ of certiorari filed in this same suit by the present petitioner and denied. It is reported at 242 U. S. 629. The petition now under consideration is based upon the identical grounds urged in the former application, with one additional ground, to-wit, that the judgment which has been rendered upon the accounting should be reduced from $570,000.00 to about $510,000.00, upon a re-examination of the facts upon which the decree was rendered.

In view of the ample presentation upon the first application of matters here involved, we shall to some extent limit our reply herein, requesting the Court at this time to refer to our former brief.

ANALYSIS OF THIS BRIEF.

1. History of the suit.

2. The rulings of the Court as to each and every matter now complained of, are based upon findings of fact upon disputed testimony, and these are found against petitioner irrespective of the rulings upon points of law.

3. The application should be denied because the only questions here presented involve no matter of gravity or importance or any question which has not been settled by repeated decisions of this Court.

4. The application should be denied because the only questions here reviewable are those which were presented upon the former application for the writ which was denied.

5. The points of law discussed and laid down by the Circuit Court of Appeals are each and every one supported by the rulings of this Court, other courts, State and Federal, and by text writers; that is to say:

   (a) That a patent of the United States for mineral land, describing the land granted by clear unambiguous description, cannot be impeached collaterally by evidence showing a mistake as to such description, nor can evidence of the proceedings of the Land Department be introduced to show a mistake of its officers as to the location or extent of the land granted.

(b) That the owner of a mining claim is not permitted to follow a vein extralaterally through planes drawn through the located end lines excepting he shows that a mistake was made by the locator in locating his claims with reference to the discovery vein, and that in order to show such mistake it is not sufficient to show merely the direction of an incidental vein first known and developed 25 years after patent, and that such incidental vein runs crosswise of the claim.

6. The judgment as to the amount due is amply supported by the evidence and has been concurred in by the two lower courts.

I.

HISTORY OF THE CASE.

This is an equitable action begun in January, 1908, by the predecessors in interest of the Conkling against the Silver King for an accounting by the former to the latter for the value of ores secretly discovered and moved from premises known as the Conkling Lode Mining Claim in Uintah Mining District, Summit County, Utah, amounting in value as alleged to about one million dollars. The parties were co-tenants of the premises, the Conkling owning an undivided three-fourths and the Silver King one-fourth. Subsequently on July 5, 1908, by amended complaint, the Conkling Company became the plaintiff, jurisdiction in the Federal Court attaching solely by reason of diversity of citizenship.

To this complaint an amended answer was interposed December 16, 1911, setting forth three distinct defenses.

1st. That the cost of extraction of the ores, a sum

in excess of $72,500, was far in excess of the value of the same, alleged to be not exceeding $20,047.50, and therefore there was no liability to account. (Trans. 5188, p. 30.)

2nd. That the true boundaries of the Conkling Lode Mining Claim were not those described in the Bill of Complaint and in the patent from the United States in that the said claim as patented was not 1500 feet in length as bounded and described therein, but only 1364.5 feet, leaving 135.5 feet of the claim, (in which were found the ores) belonging to the Silver King under subsequent overlapping patents granted to its predecessors in interest. (Trans. No. 5188, p. 31 *et seq.*)

3rd. That the ore bodies in question belonged to and were part of a vein having its apex in certain claims owned by the Silver King, and that the apex of this vein or lode (afterwards referred to in testimony as the Crescent Fissure vein) was so situated with respect to the lines of the claims in which it appeared as to give to the Silver King as its owner, the right to pursue the same extralaterally beneath the surface of the Conkling claim; and that therefore the ores discovered and mined were not those of the co-tenants, but belonged exclusively to the Silver King.

STIPULATIONS. During the course of the proceedings stipulations were made between counsel as to the conduct of the trial for the mutual convenience of the parties and in the interest of the Court. The first stipulation was dated May 6, 1910, and is as follows. (Trans. No. 3977, p. 67.)

"Stipulation as to trial. In confirmation of verbal stipulations heretofore from time to time made, it is now hereby stipulated and agreed by and be-

tween the solicitors for the respective parties in the above entitled cause, as follows:

1st. That all the issues in said cause, excepting only the accounting prayed for, are to be tried before said Court at the earliest practicable time after the first day of June, 1910.

2nd. That after the trial and determination of said issues by said Court, the accounting, if the Court shall determine the plaintiff is entitled thereto, shall then be referred to the Master."

Subsequently, when the cause was brought on for trial on January 29, 1912, (Trans. No. 3977, p. 75),

"Counsel for plaintiff stated that by the agreement of counsel the question of the ownership of the premises in controversy and the ownership of the vein situated thereon (therein) was to be tried, and that it was stipulated that a decree should be entered upon those issues, and if they should be resolved in favor of the plaintiff, an accounting would then be ordered. To this statement counsel and the Court assented."

First Trial, 1912. The trial upon the issues thus limited and defined was had, many witnesses were produced and much documentary evidence submitted, and on July 15, 1912, an opinion was handed down in favor of the Silver King, sustaining its defense both as to the boundaries and as to the extralateral rights, and dismissing the action. (Trans. No. 3977, p. 257.)

Appeal and Reversal, 1916. From the judgment entered by the District Court, dismissing the cause, an appeal was taken to the Circuit Court of Appeals, and on February 12, 1916, the judgment was reversed. By reference to the opinion (230 Fed. Rep. 553) it will be seen that the evidence was found to be insufficient to sustain

either defense, and the order was for a reversal of the decree of the lower court and a remand for further proceedings consistent with the opinion.

PETITION FOR WRIT OF CERTIORARI, 1916. A petition for rehearing having been denied, the Silver King applied to this court for a writ of certiorari. The petition was accompanied by the transcript of the record in the Circuit Court of Appeals, No. 3977, and by a brief in which were fully discussed at large the law and the evidence. This petition was submitted, and was by this Court denied on October 16, 1916, 242 U. S. 629.

THE SECOND TRIAL, 1917. The mandate was returned from the Circuit Court of Appeals and a decree entered thereon January 20, 1917, (Trans. No. 3977, p. 113,) settling the rights of the parties in accordance with the opinion of the Circuit Court of Appeals, and ordering the Silver King to account to the Conkling for three-fourths of all ores mined within the common property, and directing that an account be brought in and filed by the Silver King as nearly as may be in accordance with the 63rd Equity Rule within twenty days.

Thereupon an account was filed by the Silver King March 31, 1917, (Trans. No. 5188, p. 115,) showing an apparent liability in the sum of $78,638.61, and a few weeks later a *second* account (Trans. p. 123) reducing this to $72,750.76. At the conclusion of the testimony, a *third* account was filed by the Silver King on July 10, 1917, (Trans. p. 426) showing an apparent liability of $262,161.22. Later, on September 17, 1917, a *fourth* account was filed showing an apparent liability in the sum

of $82,510.71 (Trans. p. 41), and in its briefs in the Circuit Court of Appeals the figures were given for a *fifth* account.

The lower court on February 27, 1918, made its order and findings, and directed a decree in accordance therewith (Trans. p. 52), and later, both parties having submitted accounts according to the directions of the Court, a decree was made and entered directing the payment by the defendant Silver King to the plaintiff, of the sum of $542,222.58 as of March 1, 1918. (Trans. p. 62.)

THE SECOND APPEAL, 1918. An appeal was thereupon taken by the Silver King from this decree to the Circuit Court of Appeals, being No. 5188, and a cross appeal was taken by the Conkling. The appeals were heard in September, and December 19, 1918, an opinion was handed down dismissing the original appeal and sustaining the cross appeal by adding to the judgment the sum of $27,853.92.

The Silver King is now seeking the writ of certiorari from this Court. More than eleven years this litigation has been pending, and the effort is now for the second time made to obtain in this Court a review of the findings of fact established upon a consideration of the testimony as to matters which, by the stipulation already referred to, were to be determined before the accounting was had.

II.

The rulings as to each matter complained of are based upon findings of fact upon disputed testimony, found against petitioner irrespective of the rulings upon points of law.

There were three disputed questions decided by the Court of Appeals, namely:

First, that the boundaries of the Conkling lode claim include the strip in dispute.

Second, that the defendant had no legal right to follow the Crescent Fissure vein and extract ores therefrom beyond the end lines of their claims extended vertically downward.

Third, the amount due the complainant upon the accounting.

First. In the matter of the boundaries, the case presents two issues: one of law, and one of fact. The dispute of law was whether, in view of the fact that there was no ambiguity in the description of the claim as set forth in the patent, it was competent for the defendant to introduce field notes of the survey of the claim, which field notes referred to certain bearing trees and posts at the northwest and southwest corners of the claim (which were not referred to in the patent itself), and thereby to create an ambiguity and then to introduce testimony as to the location of these bearing trees and posts and then establish a western boundary different from that called for by the patent itself. On this question, the plaintiff contended that the evidence referred to was inadmissible, while the defendant contended that it should be considered. This question was resolved against the defendant by the Court

of Appeals, which held that the patent itself, being free from any ambiguity, its courses and distances must control.

But the decision of the Court of Appeals as to the true location of the western boundary of the Conkling lode claim was not based solely upon the issue of law above referred to. All the evidence which the defendant offered, namely, the field notes and the testimony respecting the bearing trees and posts, was received in evidence over our objection, and was in the record before the Court of Appeals. The plaintiff contended, however, that this testimony was so vague and uncertain that even if it was to be considered, it was insufficient to establish a boundary different from that described in the petition. This was the issue of fact. The Court of Appeals, notwithstanding its holding that this evidence was not competent to modify the clear and unequivocal description contained in the patent, proceeded to examine the evidence in the record upon this question, and decided that even if the law made this evidence competent and it was therefore to be considered, it was insufficient to establish a western bundary of the claim different from that described in the patent.

The language of the Court of Appeals on this point is as follows, 230 Fed. 560:

> "Nor is this all: The Court is of the opinion that if all the evidence offered had been competent it would have been insufficient to overcome the strong presumption that the plain description in the patent was right, insufficient to overcome the facts that the plat showed the claim to be 1,500 feet in

> length and 600 feet in width, that the surveyor general certified that the plat was correct, that the field notes recited that the claim was 1,500 feet in length and 600 feet in width, that the field notes, the plat and the patent each declare that the area claimed was 20.45 acres, that this is the area of a tract 1,500 feet in length and 600 feet in width, while the area of a tract 1,364.5 feet in length and 600 feet in width is nearly 2 acres less, and the persuasive presumption that the plain description in the patent expressed the actual intention of the parties to it. * * * And finally the proof that the westerly posts of the official survey upon which this patent was granted were originally set only 1,364.5 feet distant from the easterly line of the claim is not of that certain and satisfactory character which would warrant a court in avoiding, so many years after the issue of the patent, the grant which the United States clearly made."

It is clear, therefore, that even if the question of law relied upon by the defendant with respect to boundaries should be resolved in its favor, there would still be presented the question of fact as to whether under that rule of law, the evidence in the record was sufficient to overcome the clear description of the patent. This is a question of fact which was resolved, as was said, against the defendant by the Court of Appeals.

Second. In respect to the second point relied on, the right to follow the Crescent fissure extralaterally, the Circuit Court of Appeals weighed carefully the evidence relied upon by the petitioner to establish the fact insisted upon, to-wit, that the Crescent fissure was the discovery vein in each of the four claims. On pp. 562 and 563 this is commented upon at length, and after summing it all up

the Court says that it "convinces that the Crescent fissure was not his discovery vein and that it was only a cross vein in claims whose discovery veins run lengthwise of the claims," and further, that all of the enumerated facts "converge with compelling power to force our minds to the conclusion that there is no preponderance of evidence in this case that the locator of any of the defendant's claims placed it crosswise of his discovery vein."

The evidence to which the Court refers, and which is commented upon under another heading in this brief, is such as to warrant us in asserting that no error was committed by the Circuit Court of Appeals in arriving at its finding of fact.

Third. The decision of the Court of Appeals upon the amount due on the accounting so clearly involves issues of fact that no discussion of it is necessary.

The Court of Appeals in its opinion (255 Fed. 742) says:

> "Turning, then, to the finding of the court below relative to the amount of the recovery, the indisputable fact is that many of the issues that conditioned the bases of the accounting were determinable only from conflicting testimony, or from indirect evidence and the rational deductions therefrom, or from scant and unsatisfactory proof, so that after a study of the record the truth of the statement of the court below in opening its opinion on the accounting that the record in this matter is voluminous, but in many respects unsatisfactory, and the best that can be hoped for is an approximation of a true account between the parties, is conclusively demonstrated.

> "• • • The King Company should not profit in this case by its own wrong, and issues rendered uncertain or doubtful by reason of its failure to discharge its recited duties, or by its confusion of the ores from Conkling ground with those from other sources, must be resolved against it. By that rule, therefore, and by the familiar rule that, where a Court has considered conflicting evidence and made a finding or decree, the presumption is that it is correct, and unless some obvious error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand (Coder v. Arts, 152 Fed. 943, 946, 82 C. C. A. 91, 94, 15 L. R. A. (N. S.) 372), this Court must be guided in its review of the findings and decree below in this case."

It then proceeds to state and to discuss in detail the complaints made by the petitioner and to affirm the finding of the lower court.

III.

The questions presented involve no matter of gravity or importance, or any which have not been settled by repeated decisions.

The basis for our statement is the fact that the questions and the only questions which are for consideration by this Court are those which involve,

(a) the right to introduce evidence to vary the unambiguous description in a patent by evidence showing a mistake on the part of the Land Department in the proceedings leading up to patent,

(b) the right to follow the Crescent fissure through the planes of the located end lines in a case where the discovery vein is not identified.

We do not overlook the fact that on pages 30 and 31 of the petition herein it is said that a question of importance to the mining industry is presented in that it is uncertain whether the boundaries marked on the land are to govern or the language "used by the scriveners in the land office." This is but another method of saying that it is important to the mining industry to know whether it is to rely with confidence upon the descriptions contained in mineral patents or whether they are open to attack under the cover of parol evidence by showing a mistake in the proceedings leading up to the final adjudication, to-wit, the patent itself.

Nor do we overlook the fact that it is stated that there is a conflict between the decision of the Circuit Court of Appeals and the holding of the Supreme Court of Utah in the case of Grand Central Mining Company vs. Mammoth Mining Company, 36 Utah 378. This point is not again alluded to. It is not discussed in the brief accompanying the petition and the case above referred to is not even cited in the brief.

The reason is because *no such question was ever presented to or decided by the Utah Supreme Court.* The case cited does not hint at it. Besides, since two of counsel for the petitioners, Hon. W. H. Dickson and Hon. A. C. Ellis, Jr., were of counsel in that suit, and another of counsel, Hon. Thos. Marioneaux, was the Judge who presided at the first trial of the suit, 29 Utah 490, and have personal knowledge of the facts, we have no hesitation in saying that the field notes and the patent description were the same, that the field notes were introduced with-

out objection, (just as in the Resurrection G. C. Co. v. Fortune G. M. Co.) and that *each course and distance ran to a post four inches square in a mound of earth and rocks.* So that the only question before the Court in 36 Utah 378 was whether the testimony was sufficient by which the trial court re-established a missing post.

The intimation that there is a conflict between the two decisions of the Eighth Circuit Court of Appeals, to-wit, the decision in the Resurrection Gold Mining Company v. Fortune, 129 Fed. 668, and the decision in the instant case, is just as ill-founded in fact. That case was cited to the Circuit Court of Appeals upon the argument of the Conkling case, and the fact distinctly noted in the opinions was called to the attention of the Court, that *without objection from either* party, *the field notes* of survey were introduced and considered as a part of the description of the premises. This is perfectly clear from the language of Judge Sanborn on p. 672, and that of Judge Thayer, p. 685, and we submit that the case is strictly in line with that in the Conkling case, and that it cannot be said that this Resurrection Gold Mining case indicates any discordant rulings.

Nor is there any discussion in the brief of petitioner indicating that it regards the Resurrection case as sustaining petitioner's contention.

It is also suggested, p. 31 of petition, that there is a conflict between the decision in the instant case, and that of McIver v. Walker, 4 Wheat. 440. But nowhere in its brief is the latter case discussed or referred to. In fact, it is an authority in favor of respondent, since the

presumption of a survey, and that the patent conforms to it, (and this presumption becomes under the authorities an irrebutable one where there is no ambiguity in the description), is the very gist of the decision attacked in this proceeding.

IV.

The application should be denied because the only questions here reviewable are those which were presented upon the former application for the writ which was denied, 242 U. S. 629.

As will be observed from the papers constituting the former application, the two questions there presented to this Court and argued at length were those arising (a) on the construction of the patent and the introduction of evidence tending to show a mistake in the description, and (b) the question of the right to follow the Crescent fissure through the end line planes of the four claims.

Another question is here suggested, but it is one which this Court will not consider on an application such as this. It arises out of the accounting. The petitioner claims that the lower court erred in taking 6 cubic feet and 7.62 cubic feet as the average volume of first and second class ores, and in adopting the average value of all the ores of defendant as the price at which the ore to be accounted for should be figured. Petition, p. 36.

This Court has many times held that it will not re-examine questions of fact which have been concurred in by both lower courts.

The Germanic, 196 U. S. 589;
U. S. v. Stinson, 197 U. S. 207;
U. S. v. Clark, 200 U. S. 608.

V.

The points of law laid down by the Circuit Court of Appeals are each and every one in accordance with the rulings of this court and other courts, State and Federal, and with the law as laid down by text writers.

As heretofore stated, our former brief upon the matters here under consideration is referred to as probably sufficient. However, we wish to present some additional considerations.

The matters to be considered are:

(a) Did the Circuit Court of Appeals err in rejecting the field notes offered for the purpose of varying the description of the premises patented as the Conkling Lode Mining Claim, U. S. Lot 689, said offer being for the purpose of showing that the boundaries were not those unambiguously set forth in the grant, but other boundaries, the land officers having acted under a mistake?

(b) Did the Circuit Court of Appeals err in holding,

First, that the Crescent Fissure vein was not the discovery vein of the four claims in question, the Brave Columbia, Constitution, Cumberland and Monroe Doctrine?

Second, that there was no evidence to show that there was a mistake of the locator by which he located crosswise instead of lengthwise of his vein, and hence no right shown to follow the fissure through the end planes of the claims.

(a)

There was no dispute as to the two easterly end posts of the Conkling Lode Mining Claim. Taking, as the patent does, one of these posts, and following the description step by step by course and distance, there is no diffi-

culty whatsoever in determining to the fraction of an inch, what land was granted in 1892 by patent to the Boss Mining Company, the predecessor in interest of both parties.

Under these circumstances the rule is elementary that in a collateral proceeding such as this suit evidence is not admissible to show any ambiguity and then to remove the same. This is not the case of a discrepancy between calls for courses and distances on the one hand and monuments or other terminal points on the other, both being called for in the instrument. It is a question whether under settled rules, apparently without exception, a call for a course and distance only can be controlled by a monument uncalled for, identified by evidence entirely outside the instrument.

Upon this point, the Circuit Court of Appeals rightly refuses to allow to the statute of 1904 (10 Stat. Ann. 235) any force or effect, for the reason that it was without the power of Congress by subsequent legislation to vary or detract from its grant made in 1892 (p. 561). This matter is discussed at length in the brief of respondent upon the former application, pp. 71-84.

Counsel for petitioner do not dispute the general rule of law that where there is a call in a deed for a boundary by course and distance, not limited or controlled by a post or monument, parol evidence is not admissible to show that as a matter of fact the line was intended to end at a given monument or other object. The language in their brief is as follows, at p. 69:

"We do not question the general rule that where

there is in a private deed of conveyance a call for a boundary line of given distance without any statement that the end of the line is marked upon the ground by any post, monument or other object, parol evidence is not receivable to show that as matter of fact the line was intended to end at a given post, monument or other object. The intention of the parties as to what is conveyed is to be determined in a private conveyance altogether from the language of the conveyance. The deed being the final repository of the intention of the parties is not in such cases suffered to be altered by parol testimony. If the deed does not upon its face show an intention that it calls for distances shall be limited by monuments, it is presumed that no such intention existed."

We are prepared to support this rule by cases from very many states, and from Federal Courts, and it is clearly enunciated by text writers. Under the concession made this is unnecessary.

But, it is contended that this rule does not apply in the case of patents of the Government where, as claimed, "the situation is obviously quite different."

A patent is the deed of the Government, (U. S. v. Mullan, 10 Fed. 785-792) and is the instrument by which the Government passes its title. (Haynor v. Stanley, 13 Fed. 217-233.) When regular on its face it is conclusive.

"But suppose the plat and certificate of location had been made and returned to the recorder in the name of Morgan Byrne; and that it had been set up as the better title in opposition to the patent adduced on behalf of the plaintiff in ejectment; still, we are of the opinion the patent would have been the better title. We are bound to presume, for the

> purposes of this action, that all previous steps had been taken by John Robertson, Jr., to entitle himself to the patent, and that he had the superior right to obtain it, notwithstanding the claim set up by Byrne; and having obtained the patent, Robertson had the best title, to-wit, the fee, known to a court of law."
>
> Redfield v. Parks, 132 U. S. 239.

If, as urged by counsel, the patent in this case is subject to attack collaterally in a manner and upon a ground that could not obtain in the case of a grant by a private party, a patent of the government instead of being "the best title," is of a much inferior quality.

> "A patent is the highest evidence of title, and is conclusive as against the Government and all claiming under junior patents or title, until it is set aside or annulled by some judicial tribunal."
>
> Stone v. United States, 2 Wall. 525.

We have found no authority which supports the assumption made by counsel. In fact, all the authorities are to the contrary. If possible, the grantee under patent is in a more impregnable position, for the deed of the Government is in the nature of the execution of a decree, resting upon proceedings judicial in character whereby it has been determined that the grantee is the owner of the very lands described. Certain well known and recognized presumptions surround this grant and we assert confidently that no principle of the law pertaining to the public lands of the United States is more firmly established than that of the invulnerability of patents against collateral attack.

Mr. Curtis H. Lindley of San Francisco, whose name

is signed to the petition in this case, is an author of deservedly high repute. His work on Mines is a standard text book.

His conclusions are admirably stated in Sections 777 and 778, as follows:

> "With the issuance of the patent the functions of the land department terminate. It is the culmination of the proceeding in rem—the final judgment of the tribunal specially charged with passing the Government title. With the title passes away all authority or control of the executive department over the land and over the title which it conveys.
>
> To the extent that we have already covered the field, it is unnecessary to do more than recapitulate the results heretofore reached as to the force and effect of this judgment.
>
> (1) A patent for land is the highest evidence of title, and is conclusive against the Government and all claiming under junior patents or title until set aside or annulled. It is not open to collateral attack;
>
> (2) The Land Department is a tribunal appointed by Congress to decide certain questions relating to the public lands, and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else;
>
> (3) The Government having issued a patent cannot, by the authority of its own officers, invalidate it by the issuing of a second one for the same property;
>
> (4) A patent may be collaterally impeached in any action, and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others;

(5) A patent is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken;

(6) It is conclusive evidence of the citizenship and qualification of the patentee; and,

(7) In cases of mining patents, that all matters which might have been the subject of an adverse claim have been conclusively adjudicated in favor of the patentee.

As was said by the Supreme Court of the United States, in speaking of the functions of the Land Department:

Indeed, the doctrine as to the regularity and validity of its acts where it has jurisdiction, goes so far that, if under any circumstances under the existing law a patent will be held valid, it will be presumed that such circumstances existed.

It may be announced as a general rule that a patent is conclusive evidence as to the limits of a location, and that it cannot be assailed by showing that its actual boundaries were different from those described in the patent.

Nor are the proceedings on which its issuance was based admissible in evidence to impeach or vary it.

This rule is, of course, subject to the qualifications that where there is a variance between the calls of the patent for courses and distance and the monuments specified therein, the monuments control, where the monuments are clearly ascertained or established by a fair preponderance of evidence.

In retracing lines of a survey, the beginning point of a survey does not control more than any other point actually well ascertained."

Among other cases cited by Mr. Lindley to the point that the patent is conclusive evidence of the limits of the location, and that it cannot be assailed by showing that its actual boundaries were different from those described in the patent is Miller vs. Grunsky, 141 Cal. 441,

66 Pac. 858, in which was presented the very question in the case at bar. The trial court had admitted against objection the notes of the survey and other evidence to vary the terms of the patent. We quote from the opinion as follows:

> "Because of this reference in the patent to survey No. 267, defendant insisted, and the Court so ruled, that he was entitled to introduce in evidence the original survey so numbered, with the application upon which it was based, and that, as that application referred to the application of others, he was likewise entitled to introduce those several applications, with the surveys thereto attached, and that, considering all of these papers and all of these surveys, it appeared that the inclusion in the patent of the call to the Oristimba rancho was, if not a false call, at least an uncalled for and improper insertion, which should, therefore, be disregarded. But a patent of the United States is conclusive as to the matters therein contained, and especially so as to the description of the land granted, and extrinsic evidence is not admissible to impeach or vary it, and never are the proceedings upon which the issuance of the patent was based admissible in evidence for any of the indicated purposes. Moore v. Wilkinson, 13 Cal. 478; Yount v. Howell, 14 Cal. 465; Chipley v. Farris, 45 Cal. 527; Cruz v. Martinez, 53 Cal. 239; O'Connor v. Frasher, 56 Cal. 499; Brewer v. Houston, 58 Cal. 345; Adair v. White, 85 Cal. 313, 24 Pac. 663; Heinlen v. Heilbron, 97 Cal. 101, 31 Pac. 838; Irvine v. Tarbat, 105 Cal. 237, 38 Pac. 896; Dreyfus v. Badger, 108 Cal. 58, 41 Pac. 279; Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875. In Chipley v. Farris, 45 Cal. 527, the patent was issued upon a confirmed Mexican grant, the decree of confirmation being set out in the patent. The granting

clause of the patent, however, did not cover all the land that was contained in the decree of confirmation, and the patentee sought the aid of the decree so set out in the patent, to modify the granting clause of the patent. This Court held that it could not be used for that purpose, and said: 'A patent * * * is a record which binds both the Government and the claimant, and cannot be attacked by either party, except by direct proceedings instituted for that purpose. While it stands, the claimant or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent. * * * It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree, which is also incorporated into the patent, for title to lands within the decree, but not within the survey. This position cannot be maintained consistently with the views already expressed as to the nature and effect of the patent. The patent purports to convey the lands described in the survey, and its scope cannot be extended, nor on the other hand can it be limited, by showing that the decree comprised a greater or less area than the survey. Nor can the claimant, * * * make out title to lands not conveyed by the patent, by the production of the proceedings which culminated in the patent. The patent, while it remains in force, conclusively determines what lands the claimant was entitled to under his claim and the decree of confirmation. The claimant can neither reform the patent nor show that it is in any respect incorrect.' In Brewer v. Houston, *supra*, the contention was the exact opposite of the one in the case at bar. Plaintiff deraigned title under a state patent, which described the land as Survey No. 433. The Court, against defendant's

> objection, admitted evidence that Survey No. 433 was a resurvey of Survey No. 126, and so admitted Survey 126. In that survey the first call read 'running thence east 38.35 chains to Old River.' If the latter words were to be read as part of the description, the plaintiff was entitled to recover, but otherwise not; and plaintiffs claim there was that the italicized words had been omitted from the patent by mistake, just as in this case it is insisted that the call 'to the Oristimba rancho' was inserted by mistake. This Court, confirming a judgment of non-suit, said: 'If a mistake was made in failing to insert a description in the patent, we cannot see how it can be corrected in this action.' So, here, we say that if a mistake was made by inserting an erroneous call in the patent, we fail to see how it can be corrected upon this collateral attack."

A large part of petitioner's brief is devoted to an argument to the effect that the Land Department had no jurisdiction to award by sale the premises described in the Conkling patent, and that a portion of them, to-wit, the westerly 135.5 feet, should be held to belong to the petitioner as owner of the Silver Hill No. 4 and Custer No. 2 claims. It is entirely consistent with the argument made that at some future time it might be claimed that the patent of the Conkling is void to the entire extent of the conflict between that location as patented and the Silver Hill No. 4. It will be seen from the plat attached to the petition that such conflict includes much more than the 135.5 feet of the Conkling.

The argument of petitioner invites this Court to overrule a long line of decisions which have settled the

law so that for years there has been no serious dispute. Mr. Lindley states it admirably in his work from which we quote:

> "The issue of a patent to the applicant is equivalent to a determination by the United States in an adversary proceeding, to which the owner of the adverse right is in contemplation of law a party, that the applicant's and patentee's rights were superior, and those which might have been asserted by the holder of the adverse title were valueless.
>
> In other words, all matters which might have been tried under the adverse proceedings are treated as adjudicated in favor of the applicants, and all controversies touching the same are to be held as fully settled and disposed of, as though judgment had been regularly rendered in their favor.
>
> Where there is any surface conflict whatever and there is a failure to adverse, the issuance of the patent operates as a conclusive determination of priority in favor of the patentee as to the conflict area."

3 Lindley Mines, Sec. 742.

The argument of petitioners is in every way inconsistent with the foregoing.

(b)

1. The Court upon the first trial of this case did not expressly find whether or not the Crescent Fissure was the actual discovery vein of the four claims in question. (Tr. A. p. 262.) He did feel himself at liberty to hold that where the discovery vein crossed both side lines, these became end lines and an extralateral right exists. And he further held that the burden of proof, (that the discovery lode ran across instead of with the claim) was satisfactorily sustained by the petitioner. But his con-

clusions, he says, (Tr. A. p. 259,) "cannot be claimed as free from all doubt."

The Circuit Court of Appeals sets forth the facts which "converge with compelling power to force our minds to the conclusion that there is no preponderance of evidence in this case that the location of any of the defendant's claims placed it crosswise of his discovery vein." Which, of course, means that the Crescent fissure was not the discovery vein. But in addition to the recited facts, there was the further fact, abundantly shown and conceded, that the apex of the Crescent fissure was never known until 1911, twenty-eight years after location of the claims. The testimony upon this point is abundant and is from petitioner's own witnesses. Hans Johnson states (Rec. 110, 111,) that he had charge of the work under Superintendent Blood of running the Constitution East drift, from the Constitution tunnel to the easterly termination of the drift, and started the Constitution West drift as well in October, 1911, just prior to the trial of the suit. George D. Blood states (Rec. 112) that he has been superintendent since 1909, and that the Constitution East and West drifts were run by him (Rec. 174), and Walter H. Wiley, petitioner's engineer, testifies that this work along the wash from the western side line of the Monroe Doctrine develops the Crescent fissure at the line between the wash or debris and the solid formation, and that this was done between October, 1911, and January, 1912. (Rec. 128, 129.)

Furthermore, after the hearing in the Circuit Court of Appeals drifts were run beneath the discovery points

of the claims, and neither the Crescent fissure nor any other fissure or vein of any kind was found there. The Supreme Court of Utah has held that "a patent to a mining claim raises a conclusive presumption that there is the apex of a vein within the patented ground (1 Lindley on Mines, Sec. 305); but there is no presumption that it is the apex of the vein in dispute."

Grand Central Mining Co. vs. Mammoth Mining Co., 29 Utah 490, 552.

And the Circuit Court of Appeals of the Eighth Circuit had held, in a case decided long before the one at bar, that the presumption that the vein exists and that it runs lengthwise of the claim, and that the end lines fixed in the patent are the true end lines, must prevail in the absence of evidence showing that the discovery vein, instead of running lengthwise of the claim, in fact, crosses opposite side lines of the claim.

Work M. & M. Co. vs. Doctor Jackpot M. Co., 194 Fed. 620.

An application for a writ of certiorari was denied by this Court, 226 U. S. 610.

An extended argument and discussion of the law and the facts will be found in respondent's brief on the former application. (pp. 23, 32.)

2. Now, the only difference between the case as presented on the former application for writ of certiorari and the one at bar, is that certain drifts have been run which show not only that the Crescent fissure was not discovered through the pits at the discovery points, but that

no veins whatever are there found. How this alters the situation we are not able to see.

In accordance with the presumption in favor of good faith on the part of the locator, the Court says that the presumption is and the probability is that the locator thought he had discovered a longitudinal vein. Nor will this presumption be overcome until it shall be met with more convincing evidence than has ever yet been introduced. Good faith on the part of the locator would never have permitted him to make a location and to proceed to patent without making or believing he had made a discovery of mineral, and if he had discovered the Crescent fissure it would have prevented him from so placing his discovery point as to claim some 1300 feet on one side of this vein and only 200 feet on the other. Besides, while it is conceivable that he might have made a mistake as to one location, it is quite inconceivable that he made a precisely similar mistake as to three other claims which went to patent at the same time. This Court, therefore, had every right to say that this presumption of good faith on the part of the locator, together with the presumption in favor of the regularity of the proceedings of the Land Department afforded both legal presumption and actual probability that the locator thought he had discovered a longitudinal vein. If, as urged by the petitioner, the discovery point fixed in the patent need not be at the precise place where the discovery vein was disclosed, the running of one narrow drift across the claims by no means exhausted the possibilities or probabilities of a longitudinal vein within the limits of the claim.

But even if we were to admit for the sake of argument that the testimony of the witnesses who reported that they had found no evidences of a longitudinal vein in the claims, added to the demonstrative evidence of the bed rock drift beneath the discovery points were to be considered as exhausting the possibility of a longitudinal discovery vein, the opinion in this case by no means supports the contention that the Crescent fissure, discovered 25 years after patent, is to be substituted, either by legal presumption or otherwise, for the discovery vein. Nor could such a substitution carry with it the consequences argued for by petitioner. The very case cited by petitioner at page 89 of its brief, Del Monte Mining & Milling Co. vs. Last Chance M. & M. Co., forbids such a result.

Justice Brewer in that case states four propositions which cover all claims for extralateral rights:

> "First, the location as made on the surface determines the extent of rights below the surface.
> Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, places the limits, etc., etc. • • •
> Fourth, the only exception to the rule that the end lines of the location as the locator places them establishes the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case, etc., etc."

The foregoing gives no color whatsoever to the theory advanced by the petitioner that where the vein actually located on cannot be identified, another vein sub-

sequently located will by presumption be adopted as the discovery vein with the attendant exceptional rights. And it also follows as clearly as words can declare, that a failure to identify the discovery vein leaves the end lines and side lines as the locator marks them on the surface. This, together with the Walrath case, holding that for every claim there can be but one set of side lines and one set of end lines, is the basis of the decision of the Circuit Court of Appeals.

VI.

The judgment fixing the amount due is amply supported by the evidence and has been concurred in by the two lower courts.

The latter portion of the brief of petitioner (pp. 170 to 236), is devoted to a discussion of the accounting suit and the results arrived at by both the District Court and the Circuit Court of Appeals.

The petitioner kept no account whatsoever of the ores taken from the jointly owned premises, although warned at the first opportunity in writing of the claims and demands of respondent, and although a special request was made that the ores be kept separate and separately sold. (Ex. 46, Rec. B., p. 515.)

The ores so mined were mingled with other ores of the petitioner. The stopes from which they were taken were in large part caved and inaccessible when the trial was had from two to ten years after the mining was done. Not only the quantity but the quality of the ore and its value was unknown and of necessity the proper

method of arriving at the same was a matter of individual opinion.

As indicating the difficulty of arriving at a proper basis of accounting we call attention to the fact that in the sworn answer it is alleged that the ores were of a value less than the expense incurred in mining the same. Later, on March 31, 1917, before the trial of the accounting case, an account was filed. Again, on May 14, 1917, at the opening of the trial, a second account. On July 20, 1917, after the evidence was taken, a third account, and on September 17, 1917, a fourth account was filed, and when the case was argued in the Circuit Court of Appeals a fifth accounting. The first four accounts will be found in the Record, B, but the fifth is found only in the printed brief of petitioner in the Circuit Court of Appeals.

In order to show the wide range of interpretation of the facts which was traversed by the petitioner in its attempt to arrive at figures satisfactory to itself, we have tabulated these, bringing in the principal factors in such fashion as to show at a glance the uncertainty in which the entire matter was involved.

1907.

	1st Acct. 3-31-17	2nd Acct. 5-14-17	3rd Acct. 7-20-17	4th Acct. 9-17-17	5th Acct. 8-15-18
Development expenditures	$ 1,680.00	$ 1,680.00	$ 1,680.00	$ 1,680.00	$ 1,680.00
Tons 1st class ore mined	1,629.5	1,613.	2,542.96	2,542.96	2,773.45
Tons 2nd class ore mined	3,379.	3,226.	3,058.25	3,058.25	3,201.58
Tons total ore mined	5,018.5	4,839.	5,601.21	5,601.21	5,975.03
Percentage waste in stopes	None	None	None	None	None
Ratio 1st class to 2nd	1 to 2	1 to 2	1 to 1 1-5	1 to 1 1-5	1 to 1 1-6
Cubic feet dry ton first class	9	9	7.275	7.275	7.275
Cubic feet dry ton 2nd class	11	11	10.3	10.3	9.315
Ratio of concentration	3½ to 1	3½ to 1	2⅞ to 1	2⅞ to 1	2⅞ to 1
Value per ton 1st class	$ 32.25	$ 32.25	$ 32.91	$ 26.22	$ 26.22
Value per ton 2nd class	11.70	11.70	14.11	11.40	11.40
Cost of mining per ton	6.00	6.00	4.50	4.50	4.50
Cost of milling per ton	1.82	1.82	1.10	1.10	1.10
Cost tramming and sampling	.629	.629	.421	.421	.421
Gross value of ores	92,085.70	89,763.45	126,840.72	108,920.59	109,249.88
Net result of operations	49,877.02 Profit	48,928.22 Profit	92,417.21 Profit	74,497.08 Profit	72,893.37 Profit

1908.

	1st Acct.	2nd Acct.	3rd Acct.	4th Acct.	5th Acct.
Development expense	$ 4,116.16	$ 4,116.16	$ 4,116.16	$ 4,116.16	$ 4,116.16
Tons 1st class mined	1,249.5	1,197.5	397.5	397.5	546.67
Tons 2nd class mined	2,498.	2,385.	2,808.3	2,808.3	2,988.84
Total	3,747.5	3,582.5	3,205.8	3,205.8	3,535.51
Percentage waste in stope	None	None	14.3%	14.3%	14.3%
Ratio 1st class to 2nd	1 to 2	1 to 2	1 to 7	1 to 7	1 to 5.5
Cubic feet dry ton 1st class	9	9	7.275	7.275	7.275
Cubic feet dry ton 2nd class	11	11	10.3	10.3	9.315
Ratio of concentration	3½ to 1	3½ to 1	2⅞ to 1	2⅞ to 1	2⅞-1
Value per ton 1st class	$ 32.25	$ 32.25	$ 32.91	$ 20.26	$ 20.26
Value per ton 2nd class	11.70	11.70	14.11	8.99	8.99
Cost mining per ton	6.00	6.00	4.50	4.50	4.50
Cost milling per ton	1.82	1.82	1.10	1.10	1.10
Cost tramming and sampling	.629	.629	.421	.421	.421
Gross value of ores	69,523.00	66,523.87	52,706.84	33,705.55	37,772.20
Net result of operation	37,145.00 Profit	35,345.19 Profit	30,451.87 Profit	11,450.58 Profit	13,745.62 Profit

1909.	1st Acct.	2nd Acct.	3rd Acct.	4th Acct.	5th Acct.
Development expense	$ 900.00	$ 900.00	$ 900.00	$ 900.00	$ 9.00.00
Tons 1st class mined	763.	860.	1,145.3	1,000.7	1,097.81
Tons 2nd class mined	8,011.	6,880.	7,870.6	7,806.	8,739.57
Tons total	8,774.	7,741.	9,015.9	8,806.7	9,837.38
Percentage waste in stopes	10%	20%	14.3%	16.0%	14.3%
Ratio 1st class to 2nd	1 to 10½	1 to 8	1 to 7	1 to 7.8	1 to 8
Cubic feet dry tons 1st class	9	9	7.275	7.275	7.275
Cubic feet dry tons 2nd class	11	11	10.3	10.3	9.315
Ratio of concentration	3½ to 1	3½ to 1	2⅞ to 1	2⅞ to 1	2⅞-1
Value per ton 1st class	$ 32.25	$ 32.25	$ 33.91	$ 21.73	$ 21.73
Value per ton 2nd class	11.70	11.70	14.48	9.50	9.50
Cost mining per ton	5.07	5.07	4.50	4.50	4.50
Cost milling per ton	1.24	1.24	1.10	1.10	1.10
Cost tramming and sampling	.629	.629	.421	.421	.421
Gross value of ores	$118,395.45	$108,242.70	$152,803.41	$ 95,386.79	$106,294.78
Net result of operation	61,099.00 Profit	57,785.84 Profit	101,039.50 Profit	44,705.70 Profit	49,771.20 Profit

1910.	1st Acct.	2nd Acct.	3rd Acct.	4th Acct.	5th Acct.
Development expense	None	None	None	None	None
Tons 1st class mined	156.	242.	214.2	298.2	298.20
Tons 2nd class mined	1,638.	1,937.	1,822.6	2,478.38	2,468.4
Tons total	1,774.	2,179.	2,035.8	2,776.58	2,766.6
Percentage waste in stopes	33 1-3	20%	30½%	5.6%	14.3%
Ratio 1st class to 2nd	1 to 10½	1 to 8	1 to 8½	1 to 8.3	1 to 8.2
Cubic feet dry ton 1st class	9	9	7.275	7.275	7.275
Cubic feet dry ton 2nd class	11	11	10.3	10.3	9.315
Ratio of concentration	3½ to 1	3½ to 1	2⅞ to 1	2⅞ to 1	2⅞ to 1
Value per ton 1st class	$ 32.25	$ 32.25	$ 33.91	$ 22.10	$ 22.10
Value per ton 2nd class	11.70	11.70	14.48	9.68	9.68
Cost mining per ton	5.30	5.30	4.50	4.50	4.50
Cost milling per ton	1.22	1.22	1.10	1.10	1.10
Cost tramming and sampling	.629	.629	.421	.421	.421
Gross value of ores	24,195.60	30,467.40	33,640.29	30,407.46	30,310.66
Net result of operation	12,295.92 Profit	16,055.50 Profit	22,118.50 Profit	14,700.47 Profit	14,653.98 Profit

1913.	1st Acct.	2nd Acct.	3rd Acct.	4th Acct.	5th Acct.
Development expense	$ 1,944.00	$ 1,944.00	$ 1,944.00	$ 1,944.00	$ 1,944.00
Tons 1st class mined	72.75	68.	31.97	85.24	157.1
Tons 2nd class mined	249.	272.	86.38	132.85	244.9
Tons total	356.75	340.	118.35	218.09	402.
Percentage waste in stopes	14.3%	20%	75.1%	55.8%	24%
Ratio 1st class to 2nd	1 to 4	1 to 4	1 to 2 2-3	1 to 1.5	1 to 1.5
Cubic feet dry ton 1st class	9	9	7.275	7.275	7.275
Cubic feet dry ton 2nd class	11	11	10.3	10.3	9.315
Ratio of concentration	4¾ to 1	4¾ to 1	2⅞ to 1	2⅞ to 1	2⅞ to 1
Value per ton 1st class	$ 32.25	$ 32.25	$ 33.91	$ 22.87	$ 22.87
Value per ton 2nd class	4.81	4.81	14.48	9.90	9.90
Cost mining per ton	4.50	4.50	4.50	4.50	4.50
Cost milling per ton	1.20	.91	1.10	1.10	1.10
Cost tramming and sampling	.629	.629	.421	.421	.421
Gross value of ores	3,759.43	3,501.32	2,334.88	3,263.83	6,015.10
Net result of operation	227.42 Loss	298.82 Loss	262.80 Loss	136.97 Profit	1,791.71 Profit

1914.	1st Acct.	2nd Acct.	3rd Acct.	4th Acct.	5th Acct.
Development expenditures	$ 6,493.00	$ 6,493.00	$ 6,457.00	$ 2,078.00	$ 6,457.00
Tons 1st class mined	127.	127.	602.7	602.7	586.
Tons 2nd class mined	1,143.	1,143.	827.5	827.5	892
Tons total	1,270.	1,270.	1,430.2	1,430.5	1,478
Percentage waste in stopes	25%	25%	29.2%	29.2%	31%
Ratio 1st class to 2nd class	1 to 9	1 to 9	1 to 1 1-3	1 to 1 1-3	1 to 1.5
Cubic feet dry ton 1st class	9	9	7.275	7.275	7.275
Cubic feet dry ton 2nd class	11	11	10.3	10.3	9.315
Ratio of concentration	4¾ to 1	4¾ to 1	2⅞ to 1	2⅞ to 1	2⅞ to 1
Value per ton 1st class	$ 32.25	$ 32.25	$ 34.91	$ 20.66	$ 20.66
Value per ton 2nd class	4.59	4.59	14.83	8.88	8.88
Cost of mining per ton	4.50	4.50	4.50	4.50	4.50
Cost of milling per ton	1.20	1.15	1.10	1.10	1.10
Cost of tramming and sampling	.629	.629	.421	.421	.421
Gross value of ores	9,342.12	9,342.12	33,321.09	19,800.63	20,021.06
Net result of operations	4,468.69 Loss	4,411.54 Loss	19,134.04 Profit	5,622.59 Profit	5,512.65 Profit

1915.	1st Acct.	2nd Acct.	3rd Acct.	4th Acct.	5th Acct.
Development expense	$ 2,078.00	$ 2,078.00	$ 2,078.00	$ 2,078.00	$ 2,078.00
Tons 1st class mined	98.4	98.4	323.3	323.	357.48
Tons 2nd class mined	2,804.	2,804.	6,357.1	1,822.	3,607.63
Tons total	2,902.4	2,902.4	6,680.4	2,145.	3,965.11
Ratio of 1st class to 2nd	1 to 28.3	1 to 28.3	1 to 19.6	1 to 5.6	1 to 10.9
Percentage waste in stopes	25%	25%	Less than nothing	50%	14.3%
Cubic feet dry ton 1st class	9	9	7.275	7.275	7.275
Cubic feet dry ton 2nd class	11	11	10.3	10.3	9.315
Ratio of concentration	4¾ to 1	4¾ to 1	2⅞ to 1	2⅞ to 1	2⅞ to 1
Value per ton 1st class	$ 32.25	$ 32.25	$ 34.91	$ 24.48	$ 24.48
Value per ton 2nd class	5.33	5.33	14.83	10.80	10.80
Cost mining per ton	4.50	4.50	4.50	4.50	4.50
Cost milling per ton	1.20	2.59	1.10	1.10	1.10
Cost tramming and sampling	.629	.629	.421	.421	.421
Gross value of ores	18,118.72	18,118.72	105,562.19	27,548.28	47,637.36
Net result of operation	818.02 Loss	4,715.63 Loss	65,362.55 Profit	13,470.82 Profit	23,069.24 Profit

1916.	1st Acct.	2nd Acct.	3rd Acct.	4th Acct.	5th Acct.
Development expenditure	$ 1,380.00	$ 1,380.00	$ 1,150.00	$ 1,150.00	$ 1,150.00
Tons 1st class mined	None	None	None	None	None
Tons 2nd class mined	1,074.	1,074.	648.1	648.1	1,510.11
Tons total	1,074.	1,074.	648.1	648.1	1,510.11
Percentage waste in stopes	33 1-3%	33 1-3%	59.3%	59.3%	14.3
Ratio 1st class to 2nd	.....	.....	.....	.....	.....
Cubic feet dry tons 1st class	.....	.....	.....	.....	.....
Cubic feet dry tons 2nd class	11	11	10.3	10.3	9.315
Ratio of concentration	4¾ to 1	4¾ to 1	2⅞ to 1	2⅞ to 1	2⅞ to 1
Value per ton 1st class	.....	.....	.....	.....	.....
Value per ton 2nd class	$ 7.41	$ 7.41	$ 14.83	$ 14.91	$ 14.91
Cost mining per ton	4.50	4.50	4.50	4.50	4.50
Cost milling per ton	1.20	2.49	1.10	1.10	1.10
Cost tramming and sampling	.629	.629	.421	.421	.421
Gross value of ores	7,958.34	7,958.34	9,611.32	9,664.74	22,515.74
Net result of operations	314.34 Profit	1,071.14 Loss	4,737.07 Profit	4,790.49 Profit	12,682.98 Profit

SUMMARY.

	1st Acct.	2nd Acct.	3rd Acct.	4th Acct.	5th Acct.
Tons 1st class.....	4,096.15	4,205.9	5,257.93	5,249.30	5,816.71
Tons 2nd class.....	20,841.	19,722.	23,477.83	19,581.38	23,653.03
Total tonnage	24,937.15	23,927.9	28,735.76	24,830.68	29,469.74
Gross value of ores.....	$343,318.36	$333,917.92	$516,811.74	$328,697.87	$379,825.90
Net profit from operation.....	154,588.47	147,617.62	334,997.94	169,314.70	194,125.75
Conceded to be due to plaintiff..	78,638.61 (3-31-17)	72,750.76 (5-14-17)	262,161.22 (7-10-17)	82,510.71 (9-17-17)	not computed (8-15-18)

The brief now submitted on this application, in the Addenda following page 236, tenders three additional bases for computation of the amount due. It is there urged that upon one theory of the facts the judgment rendered by the District Court should be reduced to $176,002.36. Upon another theory it should be reduced to $205,691.12, and upon still another it should be reduced to $498,911.13. So that with all the ascertainable facts presumptively in its possession the petitioner has tendered accountings from time to time ranging from a nominal figure to $498,911.13, to which should be added, of course, the $27,000.00 added by the Circuit Court of Appeals, as to which no complaint appears to be made.

The amount of the judgment rendered was by no means satisfactory to the respondent, as will be seen from the Assignments of Error upon the cross appeal. Since, however, the basis of the accounting has been adopted by the District Court, and after full discussion concurred in by the Circuit Court of Appeals, we do not see how under the settled rules of this court it can be reexamined.

We respectfully submit that the petition should be denied.

EDWARD B. CRITCHLOW,
WM. D. McHUGH,
WM. W. RAY,
WM. H. KING,
WM. J. BARRETTE,
Solicitors for Respondent.

Copy served on us this .....day of September 1919.

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Solicitors for Petitioner.

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